

PR#9833

ABERNATHY, ED

3/26/2009

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THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel W.A.  
DREW EDMONDSON, in his capacity  
as ATTORNEY GENERAL OF THE STATE  
OF OKLAHOMA, and OKLAHOMA SECRETARY  
OF THE ENVIRONMENT C. MILES TOLBERT,  
in his capacity as the TRUSTEE FOR  
NATURAL RESOURCES FOR THE STATE OF  
OKLAHOMA,

Plaintiffs,

vs

No. 05-CV-0329 GKF-SAJ

TYSON FOODS, INC., TYSON POULTRY, INC.,  
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,  
AVIAGEN, INC., CAL-MAINE FOODS, INC.,  
CAL-MAINE FARMS, INC., CARGILL, INC.,  
CARGILL TURKEY PRODUCTION, LLC,  
GEORGE'S, INC., GEORGE'S FARMS, INC.,  
PETERSON FARMS, INC., SIMMONS FOODS, INC.,  
and WILLOW BROOK FOODS, INC.,

Defendants.

DEPOSITION OF ED ABERNATHY  
Taken on Behalf of the Defendants  
On March 26, 2009, beginning at 9:30 a.m.  
In Poteau, Oklahoma

APPEARANCES

Appearing on behalf of the PLAINTIFFS:

Sharon K. Weaver, Attorney at Law  
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, P.C.  
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Appearances continued on the next page

REPORTED BY: MARY K. BECKHAM, CSR, RPR

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1 APPEARANCES continued

2 Appearing on behalf of the WITNESS:

3  
4 Elizabeth Tennery, Assistant General Counsel  
5 STATE OF OKLAHOMA  
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7 Oklahoma City, Oklahoma 73152  
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10 Appearing on behalf of the DEFENDANT PETERSON FARMS:

11 Philip D. Hixon, Attorney at Law  
12 McDANIEL, HIXON, LONGWELL & ACORD  
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14 Tulsa, Oklahoma 74103  
15 918-382-9200  
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17 Appearing on behalf of the DEFENDANT CARGILL, INC.  
18 and CARGILL TURKEY PRODUCTION, LLC:

19 Colin H. Tucker, Attorney at Law  
20 RHODES, HIERONYMUS, JONES, TUCKER & GABLE  
21 100 W. 5th Street, Suite 400  
22 Tulsa, Oklahoma 74103-4287  
23 918-582-1173  
24 chtucker@rhodesokla.com

25 Appearing on behalf of the DEFENDANT GEORGE'S, INC.  
and GEORGE'S FARMS, INC.:

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1 MR. HIXON: I will go ahead and enter  
2 appearances on the record. I'm Phillip Hixon. I'm  
3 here on behalf of Peterson Farms.

4 MR. TUCKER: Colin Tucker. I'm here for  
5 Cargill and Cargill Turkey Production.

6 MS. TUCKER: I'm K.C. Tucker and I'm here  
7 for the George's defendant.

8 MS. WEAVER: Sharon Weaver. I'm here for  
9 the State of Oklahoma.

10 MS. TENNERY: Elizabeth Tennery. I'm here  
11 on behalf of Ed Abernathy.

12 ED ABERNATHY,  
13 after having been first duly sworn, deposes and  
14 says in reply to the questions propounded as  
15 follows, to-wit:

16 DIRECT EXAMINATION

17 BY MR. HIXON:

18 Q Mr. Abernathy, will you please state your  
19 name for the record?

20 A Edward J. Abernathy.

21 Q And have you been deposed before?

22 A No.

23 Q Just some ground rules. I'm going to be  
24 asking you some questions and if you can give me a  
25 verbal response, if it's a yes or no question,

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1           **A**     I retired from Soil Conservation Service.

2           **Q**     Okay.

3           **A**     I've done other things since then.

4           **Q**     Did you have gainful employment after  
5 1985?

6           **A**     Not as a full-time employee. I've done  
7 contract work.

8           **Q**     Okay. What kind of contract work?

9           **A**     Well, I bid some flood control dams. I --

10          **Q**     Who did you do that work for?

11          **A**     Soil Conservation Service.

12          **Q**     Okay. What other contract work do you do?

13          **A**     Presently I'm employed by the State  
14 Department of Agriculture.

15          **Q**     And how long have you been employed by  
16 ODAFF?

17                 MS. WEAVER: Object to the form.

18          **Q**     She object -- she didn't -- they'll make  
19 periodic objections. She didn't like the way I  
20 asked my question. You can go ahead and answer the  
21 question.

22          **A**     Would you restate it?

23          **Q**     How long have you been employed by the  
24 Department of Agriculture?

25                 MS. WEAVER: Same objection.

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1           **Q**     Is there anything that you do at the farms  
2     other than speak with the landowner?

3           **A**     No.

4           **Q**     Do you know who David Wheelock is?

5           **A**     I'm not very good at remembering names.

6           **Q**     How about Keith Smith?

7           **A**     Keith Smith. The name is familiar.

8           **Q**     Do you know Paula Albers?

9           **A**     I don't say -- I can't say that I do.

10                   (Exhibit 1 marked for identification.)

11           **Q**     (BY MR. HIXON) I'm going to hand you what  
12     we will mark as Exhibit 1 to your deposition. This  
13     is a copy of the Oklahoma Registered Poultry Feeding  
14     Operations Act. This version of the statutes came  
15     off of the ODAFF's website. I just have a couple of  
16     questions on this, but before we get to that: I  
17     read something that indicated that you were on the  
18     rules advisory committee for the Registered Poultry  
19     Feeding Operations Act; is that correct?

20           **A**     That has been 15 years ago probably.

21           **Q**     Okay. But you were on that committee?

22           **A**     For a short time.

23           **Q**     How long were you on that committee?

24           **A**     I don't remember exactly, a year or two.

25           **Q**     What did you do as a member of that

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1 land at appropriate times and rates. Discharge or  
2 runoff of waste from the application site is  
3 prohibited." Do the plans that you write contain  
4 controls that would prevent the discharge or runoff  
5 from the application site?

6 MS. WEAVER: Object to the form.

7 **A** Would you restate that question, please?

8 **Q** The plans that you write have to meet  
9 these requirements; do you understand that?

10 **A** Uh-huh.

11 **Q** Okay. And one of these requirements is  
12 that there is no discharge or runoff of poultry  
13 litter that's applied on a field. And what I'm --  
14 what I'm wanting to know is how -- do the plans that  
15 you write contain controls that would prevent that  
16 discharge or runoff from poultry -- of poultry  
17 litter from the field where it's applied?

18 MS. WEAVER: Same objection.

19 **A** That is covered under waste utilization  
20 guidelines and best management practices. And a  
21 statement that I put in about litter storage.

22 **Q** Okay. When you're saying it's covered  
23 under waste utilization practices or best management  
24 practices, are those -- those are parts of the plan?

25 **A** Yes.

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1       them -- who do you write those plans for, what  
2       regulatory body?

3           **A**       The State Department of Agriculture.

4           **Q**       Okay. So you write them for ODAFF?

5           **A**       Yes.

6           **Q**       And you're approved by the State  
7       Department of Agriculture to write those plans?

8           **A**       Yes.

9           **Q**       The regulations for the Registered Poultry  
10       Feeding Operations Act at Section 35, 17-5-3,  
11       paragraph B contains some additional requirements  
12       for the animal waste management plans. One of those  
13       requirements reads that "the plans shall be reviewed  
14       and updated at least every six years from the date  
15       the animal waste management plan was obtained.  
16       Plans shall also be reviewed and updated in the  
17       following circumstances. A, when a change in the  
18       waste utilization standards occur and upon  
19       notification by the State Department of Agriculture;  
20       B, upon recommendation of the State Department of  
21       Agriculture." Are the plans that you write, are  
22       they in effect for six years?

23          **A**       Yes.

24          **Q**       And the waste utilization standards that  
25       are referred to here, again is that the Code 590?

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1           **A**     You know, I don't know what the intent of  
2     that is.

3           **Q**     Okay. Would there be something -- some  
4     other waste utilization standard other than the Code  
5     590?

6           **A**     No.

7           **Q**     Did you understand what I read, that there  
8     would be a review when there was a change in the  
9     waste utilization standards and a notification by  
10    the State Department of Agriculture?

11          **A**     I understand that, but that's out of my  
12    jurisdiction.

13          **Q**     Okay. Let me ask you this. If there's a  
14    change in Code 590, do you amend the plans that  
15    you've written for various farmers? Is that an  
16    instruction you receive from Dan Parrish or anyone  
17    else at ODAFF?

18          **A**     I haven't received that instruction.

19          **Q**     You've never received that instruction  
20    since you've been writing plans?

21          **A**     No.

22          **Q**     Let me ask it this way. It's my  
23    understanding that Code 590, the most recent version  
24    of that is a March 2007 version; is that correct?

25          **A**     I'm not sure.



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1 application?

2 **A** Because of the slope.

3 **Q** Okay. What does the -- what does full  
4 rate split application mean?

5 **A** Well, you don't put it all on at one time.  
6 You can put on the full amount during that year, but  
7 you don't put it all on at one time.

8 **Q** Okay. How long would have to be -- how  
9 long has to transpire between the applications?

10 **A** Probably a month.

11 **Q** How much litter is considered full rate?

12 **A** Two hundred pound of phosphorus, it would  
13 depend on the litter test then.

14 **Q** But full rate assumes 200 pounds of  
15 phosphorus?

16 **A** Yes.

17 **Q** Is that 200 pounds of phosphorus per acre?

18 **A** Yes.

19 **Q** Look at Table 9. This is animal manure  
20 application rates for nutrient limited watersheds or  
21 water department?

22 **A** Yes.

23 **Q** Okay. This table would apply to plans  
24 written in the Illinois River Watershed; is that  
25 correct?

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1           **A**     Yes, sir.

2           **Q**     And here under the low category, the 0 to  
3     8 slope, you can apply a full rate -- pardon me, you  
4     can apply full rate up to a soil test phosphorus of  
5     120; is that correct?

6           **A**     That's true.

7           **Q**     Okay. And then anything over 120 but less  
8     than 300 is half rate?

9           **A**     Yes.

10          **Q**     Then 300, anything over 300 there's no  
11     application of litter?

12          **A**     Right.

13          **Q**     Is the full rate here the same as the full  
14     rate as referred to in Table 8?

15          **A**     Yes.

16          **Q**     So it would still be 200 pounds per acre?

17          **A**     Yes.

18          **Q**     And half rate would be 100 pounds per  
19     acre?

20          **A**     Yes.

21          **Q**     Do you have any idea how much of the  
22     available land within the Illinois River Watershed  
23     has a P of over 300?

24          **A**     No.

25          **Q**     Let's start looking at some plans.

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1 verification of any of the elements that are  
2 incorporated into the plan?

3 **A** I don't remember.

4 **Q** On page 2 under this introduction, about a  
5 third of the way down there's a sentence, it reads,  
6 "The law requires that the Natural Resources  
7 Conservation Service, NRCS, recommendations for  
8 litter application rates be followed." Is that a  
9 correct statement?

10 **A** May not be correct, but it's my  
11 understanding.

12 **Q** Okay. It's your understanding. Does this  
13 statement appear in all the plans that you write?

14 **A** Yes.

15 **Q** The next sentence reads, "NRCS recommends  
16 the application maximum of 200 pounds of phosphorus  
17 per acre per year if the soil test shows a  
18 phosphorus index below 250. If the soil test  
19 phosphorus index is between 250 and 400, then the  
20 rate applications are reduced by one half. If the  
21 phosphorus index is above 400, then no litter is  
22 applied." Okay. That -- based on what we just  
23 decided on the Code 590, that sounds like the  
24 non-nutrient limited watershed rate?

25 **A** Yes.

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1           **Q**     Do you believe that the plans you write  
2     help farmers protect the environment?

3           **A**     I believe they will if they will follow  
4     them.

5           **Q**     Do you believe that ODAFF tries to help  
6     farmers protect the environment?

7           **A**     I believe they fulfill their obligation,  
8     whatever that is. And I don't know what all their  
9     obligation is, but I believe they fulfill it.

10          **Q**     Well, based on your experience in working  
11     with them, do you think that helping farmers protect  
12     the environment is one of the things that just  
13     happens when ODAFF is doing the things ODAFF does?

14          **A**     Say that again.

15          **Q**     Well, you've worked with ODAFF for a while  
16     now, do you think that one of the effects of the  
17     things that ODAFF does as an agency is helping  
18     farmers protect the environment?

19          **A**     Yes.

20          **Q**     What kind of information is not contained  
21     in the plans that you write that you think ought to  
22     be?

23          **A**     It's not something that probably is  
24     lacking in the plans. It's what happens when the  
25     person gets the plan. And I don't have any control